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No. 04-593

IN THE
Supreme Court of the United States

DOMINO'S PIZZA, LLC,
DOMINO'S PIZZA, INC., AND DEBBIE PEAR,
Petitioners,

v.

JOHN MCDONALD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, COLORADO, KANSAS, MICHIGAN, NEVADA, OHIO, OREGON, TENNESSEE, UTAH, AND WASHINGTON, AND THE COMMONWEALTH OF PUERTO RICO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Troy King
Attorney General
Kevin C. Newsom
Solicitor General
Counsel of Record
STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7401

July 14, 2005

(Additional counsel for amici curiae are listed inside the front cover.)

ADDITIONAL COUNSEL

JOHN W. SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO
1525 Sherman Street
7th Floor
Denver, CO 80203

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Avenue
Topeka, KS 66612-1597

MICHAEL A. COX
ATTORNEY GENERAL
STATE OF MICHIGAN
P.O. Box 30212
Lansing, MI 48909

BRIAN SANDOVAL
ATTORNEY GENERAL
STATE OF NEVADA
Nevada Department of
Justice
100 N. Carson Street
Carson City, NV 89701

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad St.
Columbus, OH 43215-3428

HARDY MYERS
ATTORNEY GENERAL
STATE OF OREGON
1162 Court Street, N.E.
Salem, OR 97301

ROBERTO J. SÁNCHEZ
RAMOS
SECRETARY OF JUSTICE
COMMONWEALTH OF
PUERTO RICO
P.O. Box 9020192
San Juan, PR 00902-0192

PAUL G. SUMMERS
ATTORNEY GENERAL
STATE OF TENNESSEE
P.O. Box 20207
Nashville, TN 37202-0207

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
Utah State Office Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-
2320

ROB MCKENNA
ATTORNEY GENERAL
STATE OF WASHINGTON
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

QUESTION PRESENTED

In the absence of a contractual relationship with the defendant, are allegations of personal injuries alone sufficient to confer standing on a plaintiff pursuant to 42 U.S.C. §1981?

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INTEREST OF AMICI

This case involves the provision of 42 U.S.C. §1981 that protects an individual's right to "make and enforce contracts" free from racial discrimination. The States, of course, wholeheartedly endorse the policy that underlies §1981; none of the amici here sanctions or tolerates race discrimination in any shape, form, or fashion. At the same time, the States, whose officers are frequently made defendants in §1981 actions, have a keen interest in ensuring that §1981's intended scope is observed.

The Ninth Circuit's sweeping decision here is of great concern to the States, which routinely contract with private-sector companies to perform all manner of important tasks. Indeed, other than the Federal Government - to which §1981 does not apply at all, *see* 42 U.S.C. §1981(c) - the States may well be the most regular institutional contractors in the country. Among the numerous subjects of state contracts, to name just a few, are the construction of public roads and bridges, the survey and appraisal of public land, the management of state assets, the preservation of historical artifacts, and, in some instances, even the litigation of court cases. (In terms of dollars, a report presented to the Contract Review Committee of the Alabama Legislature in September 2004 provides a snapshot; it shows, for that month alone, 280 state contracts totaling almost $50 million.) By conferring §1981 standing on anyone who can show some incidental injury resulting from a contract's breach - even persons who are neither parties to nor intended third-party beneficiaries of the contracts in question - the Ninth Circuit's decision dramatically expands the prospects for state liability and increases the likelihood that important state business will bog down in litigation.

A simple example will illustrate: Suppose that a state Department of Transportation contracts with a large construction company to build a public road. For whatever

reason, the relationship between the DOT and the company sours, and the DOT cancels the contract. Then, out of the blue, one of the construction company's many employees (say, a minority engineer) sues the DOT director under §1981, alleging that, in fact, the DOT's cancellation was motivated by the large number of minority workers on the company's payroll. Certainly, in the language of McDonald's filings in this case, our hypothetical employee could demonstrate a "personal injury" independent of his company. Specifically, in the words of McDonald's complaint, he could show that he had "suffer[ed] monetary damages" – say, the marginal loss of revenues that would have trickled down to workers – as well as "pain and suffering, emotional distress, and humiliation." Pet. App. 16. Under the Ninth Circuit's rule, our employee – despite his remove from the "contract[ing]" process that §1981 aims to protect – could seek to enjoin the DOT's cancellation and to collect damages from DOT decisionmakers. *See Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019, 1021 (9th Cir. 1983) (allowing §1981 suit by Hispanic employee in similar circumstances).

The litigation explosion contemplated by the Ninth Circuit's approach to §1981 is breathtaking, and the ensuing disruption of state business, certain. The States respectfully urge the Court to reaffirm §1981's intended scope.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision conferring standing on anyone who can show some personal injury from a contract's breach – no matter how far removed he or she is from the "contract[ing]" process that §1981 protects – ignores basic standing doctrine and §1981's intended scope.

1. The "zone of interests" component of prudential standing doctrine governs McDonald's right to sue here. This Court has emphasized that the zone-of-interests test applies unless it is "expressly negated" by Congress – as, for example, where Congress grants a "particular plaintiff" the

right to sue or broadly authorizes civil actions challenging allegedly unlawful conduct. Congress did neither in §1981. Section 1981 certainly does not give any particular plaintiff a cause of action, nor does it use the expansive term "aggrieved," which has traditionally been viewed as indicative of a congressional intent to confer standing broadly.

2. This Court has consistently held that "congressional intent" defines the zone of interests protected by a particular statute. And although decisions applying the zone-of-interests test in the APA context have hedged on whether a specific intent to protect the would-be plaintiff is required, this Court has recognized that where, as here, the "generous review provisions" of the APA are not implicated, there is warrant for a strict approach to marking the covered zone. Specifically, this Court has analogized non-APA zone-of-interests cases to cases involving implied private rights of action, where a plaintiff must show (i) that Congress intended to create a private remedy and, further (ii) that Congress enacted the statute in question specifically for the benefit of "a special class of which the plaintiff is a member." The Court should now formalize the implied-right-of-action analogy and hold that to satisfy the zone-of-interests test a non-APA plaintiff must show that Congress specifically intended to protect someone in his shoes.

3. However one measures §1981's zone of interests, McDonald falls outside it. Section 1981, again, protects the right to "make and enforce contracts." The only persons who have (or can get) the "contract[]" rights to which §1981 refers are contract parties and intended third-party beneficiaries. Because McDonald is neither, he has no standing.

a. McDonald lacks standing as a contract party because, as his own complaint repeatedly acknowledges, he is not a party to the contracts in question.

b. McDonald also lacks standing as a third-party beneficiary, for two reasons. First, a thorough historical review shows that the third-party-beneficiary rule – a staple

of modern contract doctrine – had not taken hold when Congress enacted §1981 in 1866. (Recall that, whatever its precise contours, the zone-of-interests test is fundamentally a function of "congressional intent.") In England, it had become settled by 1861 that only contracting parties could sue. So, too, in this country, while several States had seemingly embraced third-party beneficiary doctrine by the time §1981 was adopted, a number of others – Massachusetts, New Hampshire, Virginia, and Pennsylvania among them – had decisively rejected it. What is more, all seem to agree that mid-nineteenth-century law, under the influence of the "classical contract school," was trending away from recognition of third-party rights. All of this is to say that mid-nineteenth-century contract doctrine was, at the very least, not so clearly *supportive* of third-party rights that one could simply assume that Congress – having said nothing in text or legislative history one way or the other – intended to incorporate into §1981 anything like the modern-day third-party-beneficiary rule.

Second, and in any event, even assuming that §1981 could be read to protect third-party beneficiaries, McDonald would not qualify. Under modern doctrine, a third party can sue on a contract only if he can show that the contracting parties specifically intended to benefit him when they struck their deal. There is nothing to suggest that the parties here contracted with the intention of benefiting McDonald specifically. McDonald, rather, was at most an incidental beneficiary and, as such, obtained no right to performance.

ARGUMENT

This is a suit brought under 42 U.S.C. §1981 – specifically, under the provision of that statute protecting citizens' rights to "make and enforce contracts" without regard to race. While recognizing that other circuits have reached "a contrary result," the Ninth Circuit here held that an individual who is "not formally a party to [a] contract" may "nonetheless sue under §1981 insofar as he seeks recovery for individual injuries separate and distinct from" those suffered by the contracting parties. Pet. App. 2. Because the Ninth Circuit's decision ignores both elementary standing doctrine and §1981's intended scope, it should be reversed.

I. The "Zone of Interests" Component of Prudential Standing Doctrine Governs McDonald's Right To Sue.

Throughout the appellate process, McDonald has maintained that he has standing to litigate his §1981 claim "because he can demonstrate unique, personal injury independent of his company." Br. of Appellant at 11, *McDonald v. Domino's Pizza, Inc.*, 107 Fed. Appx. 18 (9th Cir. 2004) (No. 02-16900). And, as noted above, the Ninth Circuit so held.

McDonald's allegations of "personal injury" are surely sufficient to satisfy Article III's baseline standing requirement that a plaintiff demonstrate a concrete, particularized, and actual "injury in fact." *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But the standing inquiry does not end with Article III. "In addition to the immutable requirements of Article III, 'the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.'" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-72 (1982)). "Numbered among these prudential requirements is the doctrine of particular concern in this case: that a plaintiff's grievance must arguably fall within the *zone of interests* protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Id.* (emphasis added).

This Court has made clear that its "prudential standing doctrine" – including the zone-of-interests component at issue here – "applies unless it is expressly negated" by Congress. *Id.* at 163. Specifically, Congress can "eliminate[] any prudential standing limitations" by expressly "grant[ing] a particular plaintiff the right" to sue. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). In *Trafficante v. Metropoli-*

tan Life Insurance Co., 409 U.S. 205 (1972), for instance, this Court found that Congress had manifested its "'intention to define standing as broadly as permitted by Article III'" – and, thus, to negate prudential standing limitations – by giving an express cause of action to "'any person who claims to have been injured by a discriminatory housing practice.'" *Id.* at 208 (quoting, respectively, *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971), and 42 U.S.C. §3610(a)). Other decisions dispensing with prudential standing requirements follow a similar pattern – they deal with statutes in which Congress expressly and broadly authorized civil suits challenging allegedly unlawful conduct. *See, e.g., Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 328-29 (1999) ("Congress has eliminated any prudential concerns in this case by providing that '[a]ny person aggrieved ... may in a civil action obtain declaratory, injunctive, and any other appropriate relief ....'"); *FEC v. Akins*, 524 U.S. 11, 19 (1998) (statute providing that "[a]ny party aggrieved ... may file a petition" in district court); *Bennett*, 520 U.S. at 164 (statute providing that "any person may commence a civil suit"); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 102-03 (1979) (statute providing that "[t]he rights granted ... may be enforced by civil actions").

Section 1981 does not bear any of the markings of a statute that eliminates prudential standing limits and extends standing to the limits of Article III. Section 1981 certainly does not in so many words give any "particular plaintiff" the right to sue. *Raines*, 521 U.S. at 820 n.3. Nor does §1981 use the expansive term "aggrieved," which "[h]istory associates ... with a congressional intent to cast the standing net broadly." *Akins*, 524 U.S. at 19. Nor, for that matter, does §1981 expressly create any private cause of action at all; the right to sue for alleged violations of §1981 has been judicially implied. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Runyon v. McCrary*, 427 U.S. 160, 168-74 (1976).

Because Congress did not by any measure "expressly negate[]" prudential standing requirements in §1981 (either in the original 1866 enactment or in the 1991 amendments), the "zone of interests" test governs McDonald's right to sue here. The question then becomes whether McDonald, as a non-party to the contract that forms the basis of his §1981 claim, falls within the "zone" that §1981 covers. Before turning to that specific question (which we will consider in Part III), we briefly address the role of congressional intent in marking the boundaries of a statute's zone of interests.

II. As It Applies Here, the "Zone of Interests" Test Requires Evidence of a Specific Congressional Intent To Protect the Would-Be Plaintiff.

The zone-of-interests test had its genesis in cases involving challenges to administrative action under §10(a) of the Administrative Procedure Act, 5 U.S.C. §702(a). *See, e.g., Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 394-403 (1987); *Air Courier Conf. of America v. American Postal Workers Union*, 498 U.S. 517, 523-24 (1991); *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488-99 (1998). In all honesty, this Court's explication of the test in APA cases has been somewhat inconsistent. In particular, while repeatedly affirming in broad terms that the task in applying the test is "basically one of interpreting congressional intent," *Clarke*, 479 U.S. at 394, the Court has "vacillate[d] between holding that the test requires a showing that Congress intended to benefit a would-be plaintiff and holding that it requires no such showing," Jonathan R. Siegel, *Zone of Interests*, 92 Geo. L. J. 317, 318 (2004).

Initially, the Court in *Clarke* noted that "there need be no indication of congressional purpose to benefit the would-be plaintiff." 479 U.S. at 399-400. Several years later, however, in *Air Courier*, the Court clarified that, in fact, a showing of congressional intent to benefit the plaintiff *is* required. *See* 498 U.S. at 524-28; *see also* Siegel, *supra*, at 330 ("By clear and

repeated statements, the [*Air Courier*] Court confirmed that the very heart of the test was whether Congress intended the [statute in question] to benefit [the would-be plaintiff] ....''). But then, in *National Credit Union*, the Court seemed to revert back to a *Clarke*-like view that courts "should not inquire whether there has been a congressional intent to benefit the would-be plaintiff." 522 U.S. at 489. Dissenting in *National Credit Union*, Justice O'Connor identified the chief failing of an excessively lax zone-of-interests test: By "eschewing any assessment of whether [a given statutory] provision was intended to protect [a particular plaintiff's] interest" and by instead giving standing to anyone who "ha[s]" an interest that is "affected" by the statute's operation, courts would cause the zone-of-interests test to collapse into Article III's injury-in-fact requirement, "rendering the zone-of-interests test ineffectual." 522 U.S. at 505 (O'Connor, J., joined by Stevens, Souter, and Breyer, JJ., dissenting).

The dust-up over the zone-of-interests test's proper application in the APA context needn't detain the Court here, as McDonald's suit does not challenge agency action or otherwise involve the APA. This Court has clarified that, although initially a creature of the APA, the zone-of-interests test is a "prudential standing requirement[] of general application" that "applie[s] ... also in suits not involving review of federal administrative action." *Bennett*, 520 U.S. at 163. More to the point for present purposes, this Court has "made clear" that the zone-of-interests test applies more strictly (*i.e.*, to exclude more would-be plaintiffs) outside the APA context than within: "[T]he breadth of the zone of interests varies according to the provision of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the '"generous review provisions"' of the APA may not do so for other purposes." *Id.* (quoting *Clarke*, 479 U.S. at 400 n.16 (quoting *Data Processing*, 397 U.S. at 156)); *see also* William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 237 n.84 (1988) ("[P]laintiffs in [non-APA] cases have to meet a higher threshold test in showing that judicial protection of their interests is intended by the statute in question").

The lengthy discussion in *Clarke*'s footnote 16 (reiterated later in *Bennett*) provides a glimpse into the Court's thinking about the sometimes-loose application of the zone-of-interests test in the APA context and its comparatively strict application outside the APA. Referring to then-prevailing cases concerning implied private rights of action, the *Clarke* Court observed that "[t]he difference made by the APA can be readily seen by comparing the 'zone of interest' decisions [involving the APA] with cases in which a private right of action under a statute is asserted in conditions that make the APA inapplicable." *Clarke*, 479 U.S. at 400 n.16 (citing *Cort v. Ash*, 422 U.S. 66 (1975), and *Cannon v. University of Chicago*, 441 U.S. 677 (1979)). In the implied-right-of-action cases, the Court said, "the would-be plaintiffs [had] the threshold burden of showing that they were 'one of the class for whose *especial* benefit the statute was enacted'" – which, the Court continued, was "[c]learly ... more ... than a showing that their interests were arguably within the zone protected or regulated" by the statute under which they were suing. *Id.* (quoting *Cort*, 422 U.S. at 78).

The Court should take the opportunity in this case to make explicit what is perhaps only implicit in *Clarke* and *Bennett*: That outside the APA – whose "generous review provisions" have at times been invoked to justify a loose zone-of-interests analysis – the test *requires evidence of a specific congressional intent to protect the would-be plaintiff*. The analogy drawn (if only obliquely) in *Clarke* between the non-APA zone-of-interests test and the approach to implying private rights of action is spot-on. Both are driven by fundamental separation-of-powers principles. For its part, "standing doctrine," as Justice Stevens has accurately summarized, is plainly "rooted in separation-of-powers concerns." *Steel Co. v. Citizens for a Better Environment*, 523

U.S. 83, 125 n.20 (1998) (Stevens, J., dissenting). The Court explored the connection at some length in *Allen v. Wright*, observing that the "case or controversy" requirement - and particularly the standing doctrine - "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." 468 U.S. 737, 750 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (standing is "a principle fundamental to the separate and distinct constitutional role of the Third Branch"). More particularly relevant here, the Court has emphasized that prudential standing doctrine specifically - and, more specifically still, the zone-of-interests test - is "'founded in concern about the proper - and properly limited - role of the courts in a democratic society.'" *Bennett*, 520 U.S. at 162 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

So, too, this Court's implied-right-of-action decisions have gradually - but decisively - embraced Justice Powell's separation-of-powers-based view that "Congress ... should determine when private parties are to be given causes of action under legislation it adopts" and, accordingly, that "[w]hen Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Cannon*, 441 U.S. at 730-31 (Powell, J., dissenting). Thus, this Court in *Alexander v. Sandoval*, emphasized a "particular understanding of the genesis of private causes of action." 532 U.S. 275, 286 (2001). Specifically, the Court said, because "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress," "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* To that end, this Court clarified, the question whether or not Congress actually, affirmatively intended to create a private remedy is "determinative." *Id.*

Importantly for present purposes, in the implied-right-of-action context, congressional intent is essential not only to determining *whether* to permit private suits at all, but also to determining *who* should be permitted sue. Specifically, this Court's cases (the very cases alluded to in footnote 16 of *Clarke*) have emphasized that a key consideration in recognizing a private remedy is whether the statute in question was enacted for the benefit of "a special class of which the plaintiff is a member." *Cannon*, 441 U.S. at 689. Indeed, even in the heyday of implied private rights, the decisive question was whether the statute at issue "was enacted for the benefit of a special class" of beneficiaries; if so, a court could recognize a remedy, but only "for members of that class." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374 (1982); *see also, e.g., Cort*, 422 U.S. at 78 (whether "the plaintiff [is] 'one of the class for whose *especial* benefit the statute was enacted'" (quoting *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916))). "The question" under these decisions, in sum, "is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California v. Sierra Club*, 451 U.S. 287, 294 (1981).

This Court should now formalize the implied-right-of-action analogy it suggested nearly 20 years ago in *Clarke*. It should hold that, as applied outside the context of the APA, the zone-of-interests test requires a would-be plaintiff (here, McDonald) to show that in enacting the statute that forms the basis of his suit (here, §1981) Congress clearly and specifically intended to protect someone in his shoes.

III. By Any Measure, McDonald Is Not Within the Zone of Interests Congress Intended To Protect in Section 1981.

However one measures the zone of interests Congress intended to protect in §1981 - whether somewhat loosely, as in the APA cases, or more strictly, in accordance with the

implied-right-of-action analogy sketched in *Clarke* – McDonald lacks standing to sue. In relevant part, §1981, which was enacted as part of the landmark Civil Rights Act of 1866, provides that "[a]ll persons ... shall have the same right ... *to make and enforce contracts* ... as is enjoyed by white citizens ...." 42 U.S.C. §1981(a) (emphasis added). Who, exactly, is covered by those terms? Who has (or can get) the "right to make and enforce contracts" that the statute protects? As every first-year law student learns, there are really only two ways that one can acquire contract rights: first, and most obviously, one can be an actual party (or formal assignee) to the contract in question; second, at least under modern doctrine, a non-party can acquire contract rights if he is what the law calls an "intended third-party beneficiary."

McDonald fits neither description. He is not himself a party to any of the contracts at issue here, nor is he an intended third-party beneficiary of those contracts. As a result, he is for present purposes a stranger to the contracts and plainly outside the zone of interests protected by §1981.

A. McDonald Lacks Standing as a Contract Party.

The courts of appeals that have addressed the issue head-on (with the obvious exception of the Ninth Circuit) have all held that only the contracting parties themselves have standing to sue under §1981. In so holding, those courts have pointed to §1981's language – "make and enforce contracts" – as the first and best indicator of Congress's intent with respect to the protected zone of interests. Thus, facing a claim (like the one here) by a company's sole shareholder that Wal-Mart had terminated the company's contract for discriminatory reasons, Judge Boudin, writing for the First Circuit, concluded that "[n]othing in section 1981 provides a personal claim, so far as its language is concerned, to one who is merely *affiliated* – as an owner or employee – with a contracting party that is discriminated against by the company that made the contract." *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999). Rather,

Judge Boudin wrote, §1981's "statutory language ... precludes" a §1981 claim by a sole shareholder "unless he also ha[s] a contract" with the defendant. *Id.* The shareholder "had no claim of any kind under section 1981 because he had no contract." *Id.*

The Seventh Circuit's decision in *Kyles v. J.K. Guardians Security Servs., Inc.*, 222 F.3d 289 (7th Cir. 2000), is to the same effect. There, the court held that §1981's language "protects the right to enter into and preserve a contractual relationship, period." *Id.* at 303. "The terms of 1981 are more narrow" than those of other civil-rights statutes in that §1981 "protects the contractual relationship itself." *Id.* Accordingly, the court said, "[t]he class of persons who may bring suit is ... limited to persons who actually wish to enter into (or remain in) that relationship." *Id.* Because the plaintiffs before it – employment "testers" who were obligated to reject any job offer made to them – had no intention "to enter into a contract" with the defendant, the court found that they had no §1981 standing. *Id.* at 302. *See also The Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002) (only the "party seeking to contract with the defendants" had §1981 standing).

That McDonald is not formally a party to the contracts at issue here is clear enough. McDonald's own complaint repeatedly recognizes that the contracts, instead, are between Domino's and JWM Investments, Inc., McDonald's company. *See* Pet. App. 12 (contracts were "between JWM and Domino's"); *id.* at 14 (same); *id.* ("contract with JWM"). McDonald's sole connection to the contracts was "in his capacity as President of JWM," in which he admits he was "acting for JWM." *Id.* at 11. Accordingly, if, as the courts of appeals seem to have assumed, a proper §1981 plaintiff must himself have been a party to the contract that forms the basis of his claim, McDonald lacks standing.

B. McDonald Lacks Standing as a Third-Party Beneficiary.

The court of appeals' decisions, conferring §1981 standing only on those who formally enter into contractual relationships, make sense. An ordinary understanding of the statutory phrase "make and enforce contracts" would seem, at the very least, to focus on the actual parties to those contracts. There remains, however, the possibility that one who is not formally a party to a contract, but is nonetheless an intended third-party beneficiary of that contract, might have standing to sue under §1981. Although, apparently, no appellate court has addressed that issue head-on, a few scattered decisions seem to assume that third-party-beneficiary status could be sufficient to confer §1981 standing. *See Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1339 (2d Cir. 1974); *Jones v. Local 520, Int'l Union of Operating Engineers*, 603 F.2d 664, 665 (7th Cir. 1979). Careful analysis reveals that assumption to be unfounded.

As we will explain, third-party-beneficiary doctrine cannot aid McDonald here, for two reasons. First a thorough review of the history strongly indicates that third-party rights were not within the contemplation of Congress when it enacted §1981 in 1866 – and are thus not part of the zone of interests protected by that statute. Second, and in any event, McDonald is not a third-party beneficiary of the Domino's-JWM contracts in question.

1. Third-Party Beneficiaries Are Not Within the Zone of Interests Congress Intended To Protect in Section 1981.

On their face, §1981's terms – at least as those terms are presently understood – might suggest an intention to cover third-party beneficiaries. Section 1981's core provision, again, protects the right to "make and enforce contracts." Only contracting parties, of course, can "make" a contract. But at least under modern law, an intended third-party

beneficiary can "enforce" contractual duties made by the contracting parties specifically for his benefit. *See Restatement (Second) Contracts* §304 (1981) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, *and the intended beneficiary may enforce the duty.*" (emphasis added)); 13 *Williston on Contracts* §37:1, at 9 (R. Lord, ed., 4th ed. 2000) ("Under [third-party beneficiary] doctrine, an individual who is not a party to a contract can enforce the contract under certain circumstances."). The same, seemingly, goes for Congress's 1991 elaboration on the meaning of the phrase "make and enforce" to include, for instance, the "performance, modification, and termination of contracts." 42 U.S.C. §1981(b). While only contracting parties may "modif[y]" or "terminat[e]" an existing contract, *cf. Restatement* §311(2), an intended third-party beneficiary does, in certain circumstances, have a right to demand contract "performance," *see id.* §302(1).

The inclusion of intended third-party beneficiaries within §1981's zone of interests, however, is not so straightforward. As noted above, whatever its precise contours, the zone-of-interests test is fundamentally a function of "congressional intent." *Clarke*, 479 U.S. at 394. The question, therefore, is not whether §1981 can plausibly be read today – even if anachronistically – to cover third-party beneficiaries; the question, instead, is whether the 39th Congress, which enacted what is now §1981(a) as part of the Civil Rights Act of 1866, itself affirmatively intended to protect third parties.

Section 1981's language, in and of itself, does not tell us much about whether Congress intended to protect third-party beneficiaries' rights. Nor, as best we can tell, is there any smoking gun in the Civil Rights Act's legislative history that explains precisely what kinds of contract rights Congress intended to cover.[1] In the absence of any compelling

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[1] While there are a number of passing references to the Act's "make and enforce contracts" clause, *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 475,

evidence in those traditional sources, it makes sense to consider in some detail the state of general contract law as it existed circa 1866 to determine whether it can simply be assumed that the 39th Congress intended to include non-parties within the scope of the Act's "make and enforce contracts" provision. As we explain, it is not at all clear that such an assumption is warranted.

Justice Scalia (joined by Justice Kennedy) has waded into these historical waters before. In a concurring opinion in *Blessing v. Freestone*, Justice Scalia observed that "[u]ntil relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it ...." 520 U.S. 329, 349 (1997). More to the point for present purposes, citing an amicus brief filed in that case, Justice Scalia noted that "[t]his appears to have been the law at the time §1983 was enacted" in 1871 – just five years after the enactment of §1981 in 1866. *Id.* at 350. The detailed discussion that follows tends to confirm Justice Scalia's admittedly tentative assessment.

"Under the traditional common-law rule, only parties in privity of contract could sue on the contract"; third parties were treated as strangers to the contract, without any enforcement rights whatsoever. 13 Williston §37:1, at 5. Obviously, things have changed; the third-party beneficiary rule is a staple of modern American contract doctrine.[2] The

476, 478, 598 (Jan. 29-Feb. 2, 1866), there are apparently only three substantive discussions: one involving the clause's application to mixed-race marriage contracts, *see id.* at 505-06 (Jan. 30, 1866); another concerning the clause's application to Indians, *see id.* at 571-72 (Feb. 1, 1866); and another considering whether the Act gave the federal courts the power to fashion a federal common law of contracts or, instead, simply required courts to enforce state contract law without regard to race, *see id.* at 1781-82 (Apr. 5, 1866).

[2] The same, interestingly, cannot be said for other common-law countries. Until 1999, England steadfastly rejected the third-party beneficiary rule. *See* Contracts (Rights of Third Parties) Act 1999 (Eng.). Canada seems to have acknowledged third-party enforcement only in 1992. *See*

questions for present purposes, given the focus on congressional intent, are how (and when) we got from A to B, and, more particularly, whether, given the legal landscape as it existed in 1866, the 39th Congress can be assumed to have intended to weave third-party beneficiary principles into §1981's "make and enforce contracts" clause. Given the history as we understand it, the answer to the latter question, in all probability, is no.

There are several useful accounts of the history of the third-party-beneficiary rule. *See, e.g.*, Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1109 (1985); M.H. Hoeflich & E. Perelmuter, *The Anatomy of a Leading Case:* Lawrence v. Fox *in the Courts, the Casebooks, and the Commentaries*, 21 U. Mich. J. L. Ref. 721 (1988); Peter Karsten, *The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case*, 9 Law & Hist. Rev. 327 (1991); Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358 (1992). While these accounts diverge at various points along the way, there are important areas of general agreement.

As an initial matter, there is the acknowledged course of the rule's evolution in England. During the seventeenth and eighteenth centuries, courts clearly permitted at least some third parties to sue on contracts made for their direct benefit. *See Dutton v. Poole*, 83 Eng. Rep. 523 (K.B. 1677); *Martyn v. Hind*, 98 Eng. Rep. 1174 (K.B. 1776). But by the mid-nineteenth century attitudes had changed – so much so that Chitty's 1842 contracts treatise could report that although third-party-beneficiary cases "seem to have been contradic-

London Drugs Ltd. v. Kuehne & Nagel Int'l Ltd. [1992] 3 SCR 299 (Can. Supr. Ct.). And despite rumblings in Australia's courts, that country has yet to embrace third-party-beneficiary doctrine. *See* John Adams, *Digital Age Standard Form Contracts Under Australian Law*, 13 Pac. Rim L. & Pol'y J. 503, 519-20 (2004).

tory in the past," it was "now a rule of law" that "the consideration for a promise must move from the plaintiff" himself and that a third party, as such, had no enforceable rights. Joseph Chitty, Jr., *Contracts* 53 (London 1842). As Professor Karsten has summarized, save for two outliers, every third-party-beneficiary plaintiff in England between 1790 and 1861 was "turned away on the grounds that no consideration had moved from the plaintiff and that he or she was not privy to the contract." Karsten, *supra*, at 337 & n.49 (collecting cases); *see also Hybart v. Parker*, 140 Eng. Rep. 1063, 1065 (C.P. 1858) ("[I]f it be a hardship" that a third party cannot sue, "the remedy must be sought at the hands of the legislature."); *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842) (requiring privity); *Langridge v. Levy*, 150 Eng. Rep. 863 (Ex. 1837) (same).

This decided English trend away from third-party rights during the nineteenth century culminated in *Tweddle v. Atkinson*, 121 Eng. Rep. 762 (Q.B. 1861), which expressly repudiated the earlier cases in favor of a hard-and-fast rule forbidding suit by non-parties. As Judge Crompton explained there:

> The modern cases have, in effect, overruled the old decisions; they shew that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purposes of suing upon it for his own advantage, and not a party to it for the purpose of being sued.

Id. at 763. *Tweddle* was and is "viewed as the leading case in England." Karsten, *supra*, at 337; *accord* Guenter Treitel, *Some Comparative Notes on English and American Contract Law*, 55 SMU L. Rev. 357, 358 (2002) ("[T]he refusal of the English common law, in general, to recognise" third-party beneficiary rights is "associated with the case of *Tweddle v. Atkinson*."). As will become clear, the doctrinal shift that *Tweddle* represents manifested itself in this country, as well.

American third-party-beneficiary doctrine is typically traced to the New York Court of Appeals' plurality decision in *Lawrence v. Fox*, 20 N.Y. 268 (1859). *See, e.g.*, 13 Williston §37:1, at 8 (calling *Lawrence* "the leading United States decision"); Treitel, *supra*, at 358 ("The early development of the American third party beneficiary doctrine is usually associated with the New York case of *Lawrence v. Fox*."); Hoeflich & Perelmuter, *supra*, at 721, 727 (calling *Lawrence* the "leading case" and the "landmark case"). The facts of *Lawrence* are simply stated: One Holly, admitting that he owed Lawrence $300, lent the money to Fox, who, in turn, promised that he would repay it Lawrence the next day; he did not, and Lawrence, a non-party to the Fox-Holly agreement, sued on the contract. The New York court allowed the suit, declaring that when "a promise [is] made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach." *Lawrence*, 20 N.Y. at 275.

Many legal historians are firmly of the view that *Lawrence* "began the career of the so-called third-party beneficiary contract." Lawrence M. Friedman, *A History of American Law* 534 (2d ed. 1985). The decision, they say, "departed significantly from nineteenth-century contract doctrine" and, more specifically, "represented the first time an American court permitted a third-party beneficiary to recover in a commercial context." Hoeflich & Perelmuter, *supra*, at 726. To these commentators, the New York court "defied the prevailing rules of contractual liability" by holding that "a third-party - someone who was not a party to the contract, had no obligation under it, and had given nothing in exchange for the right being claimed - could, nevertheless, enforce it." Waters, *supra*, at 1111 (abstract); *accord id.* at 1116 (*Lawrence* announced "an idea ... plainly at odds with the received wisdom of its time"); *id.* at 1140 ("great departure from prior law"). In fact, some say, "the mainstream of American contract law at the time of *Lawrence v. Fox*, and" - significantly for present purposes - "for at least half a century thereafter, was more nearly atomistic [than altruis-

tic], jealously guarding the autonomy of contracting parties by insisting upon 'privity of contract' between plaintiff and defendant." *Id.* at 1112.

Plainly, if the view of *Lawrence* as legal bombshell is correct, then §1981 should not be read to protect third-party rights. It is almost inconceivable that an idea born in 1859 could have become so woven into the fabric of American law by 1866 that Congress could be presumed to have embraced it *sub silentio*. But, in fairness, others are less certain that *Lawrence* was such a bolt out of the blue. *See* Eisenberg, *supra*, at 1362-64 (*Lawrence* "was not very remarkable for its time"); Karsten, *supra*, at 333 (*Lawrence* "did not 'begin the career' of the third-party beneficiary rule"). And, in fact, it seems clear enough from the historical record that mid-nineteenth century law was not monolithically opposed to third-party claims. Professor Karsten, for instance, has noted several jurisdictions that, in the Civil War era (and even before *Lawrence*), allowed third-party suits. *See* Karsten, *supra*, at 340 n.67, 344. Antebellum courts in Illinois, for instance, seem to have been uniform in allowing third-party beneficiaries to sue. *See Bristow v. Lane*, 21 Ill. 194, 197-98 (1859). Ohio and Maine, too, apparently permitted third-party-beneficiary suits in the years leading up to the Civil War. *See Crumbaugh v. Kugler*, 3 Ohio St. 544 (1854); *Bohanan v. Pope*, 42 Me. 93 (1856). In South Carolina, at least two lower-court decisions in the 1840s permitted third parties to sue and recover. *See Thompson v. Gordon*, 3 Strob. 196 (S.C. Ct. App. 1848); *Brown v. O'Brien*, 1 Rich. 268 (S.C. Ct. App. 1845). And Alabama courts likewise permitted third-party suits in clear terms – at least where the would-be plaintiffs were creditor, as opposed to donee, beneficiaries. *See Shotwell v. Gilkey's Administrators*, 31 Ala. 724 (1858). Karsten also lists California and Kentucky among the States allowing third-party suits, although the decisions cited either referred to the third-party beneficiary rule only obliquely, and then only in dicta, *see Barringer v. Warden*, 12 Cal. 311 (1859); *Lucas v. Chamberlain*, 47 Ky. 276 (1847), or seemed to limit the

rule's reach to contracts involving close family members, *see Clarke v. McFarland's Executors*, 5 Dana 45 (Ky. Ct. App. 1837).

The trick, then, is in assessing the overall state of third-party-beneficiary doctrine circa 1866 – specifically, with an eye to determining whether the 39th Congress (having said nothing one way or the other) can simply be assumed to have intended to bring third-party rights within the ambit of §1981's "make and enforce contracts" language. The historical record will not support that kind of inference. Even allowing for the fact that some American jurisdictions were permitting third-party suits during the mid-nineteenth century, a number of others were not.

Indeed, in keeping with the trend in England – which, as noted above, culminated in the 1861 decision in *Tweddle v. Atkinson* – there was a substantial (and seemingly swelling) body of mid-nineteenth-century American precedent denying third parties the right to sue. *See* Karsten, *supra*, at 344-45 ("But if a few states had considered and rejected the new trend in English doctrine regarding third-party beneficiaries in the late 1840s and 1850s, other states ... were moving simultaneously to adopt the new English reasoning."). Among the States refusing to recognize third-party claims –

- **Massachusetts:** Although a few early cases allowed third-party suits, *see, e.g., Felton v. Dickinson*, 10 Mass. 287 (1813), by mid-century the courts had firmly rejected third-party-beneficiary doctrine in favor of a strict privity rule, *see Mellen v. Whipple*, 67 Mass. 317 (1854); *Dow v. Clark*, 73 Mass. 198, 201 (1856).[3]
- **New Hampshire:** Nineteenth-century cases overwhelmingly rejected third-party-beneficiary suits. *See, e.g., Butterfield v. Hartshorn*, 7 N.H. 345 (1834);

[3] Indeed, Massachusetts did not embrace the third-party-beneficiary rule until 1979. *See Choate, Hall & Stewart v. SCA Servs., Inc.*, 392 N.E.2d 1045, 1049-51 (Mass. 1979).

Warren v. Batchelder, 15 N.H. 129 (1844); *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N.H. 249 (1875); *Land v. Henry*, 54 N.H. 57, 64 (1873).

- **Virginia:** Virginia courts early on refused to allow common-law contract actions by third parties, *see Ross v. Milne*, 12 Leigh 204 (Va. 1841), and apparently held to that rule throughout the nineteenth century, *see Jones v. Thomas*, 62 Va. 96 (1871); *Stuart v. James River & Kanawha Co.*, 65 Va. 294 (1874); *Willard v. Worsham*, 76 Va. 392 (1882).
- **Vermont:** Nineteenth-century decisions established that suits could be maintained only by contracting parties. *See, e.g., Pangborn v. Saxton*, 11 Vt. 79 (1839); *Hall v. Huntoon*, 17 Vt. 244 (1845); *Fugure v. Mutual Soc'y of St. Joseph*, 46 Vt. 362 (1874).
- **Pennsylvania:** Early cases allowed common-law contract suits by third-party beneficiaries, *see Hind v. Holdship*, 2 Watts 104 (Pa. 1833), but gave way to a mid-nineteenth-century rule decisively rejecting third-party claims, *see Blymire v. Boistle*, 6 Watts 182 (1837); *Finney v. Finney*, 16 Pa. 380 (1851).
- **Michigan:** It was settled in the mid-nineteenth century that a third party could not sue even on a contract made specifically for his benefit. *See Brown v. Hazen*, 11 Mich. 219 (1863); *Pipp v. Reynolds*, 20 Mich. 88 (1870).
- **North Carolina:** Although an 1852 case seemed to leave the door to third-party rights cracked, *see Carroway v. Cox*, 44 N.C. 173 (1852), a decision eight years later closed it, *see Styron v. Bell*, 53 N.C. 222 (1860).
- **Missouri:** While decisions during the 1840s treated the issue as unsettled, *see Bank of Missouri v. Benoist*, 10 Mo. 520 (1847), and were themselves somewhat contradictory, *compare Belt v. McLaughlin*, 12 Mo. 433 (1849) (allowing third-party suit), *with Jones v. Miller*, 12 Mo. 408 (1849) (refusing), by 1858 Missouri courts had adopted a strict privity requirement, *see Manny v. Frazier's Administrator*, 27 Mo. 419 (1858); *Page v. Becker*, 31 Mo. 466 (1862).

So, if we're just counting mid-nineteenth-century noses, the case law reveals something of a split, with some States permitting third-party suits, but with a number of others (including influential States like Massachusetts, New Hampshire, Virginia, and Pennsylvania) refusing. At the very least, it seems safe to say that the reported decisions were not so *supportive* of third-party rights that the 39th Congress could be assumed, on the basis of the case law alone, to have incorporated into §1981's "make and enforce contracts" clause anything like modern third-party-beneficiary doctrine.

Additionally, there is more to the story than nose-counting. The common law is not static, of course, but dynamic, and in that respect there are two trends worth noting – both of which undercut any assertion that Congress through its silence necessarily intended to protect third-party rights in §1981. First, even those with a more bullish view of nineteenth-century third-party-beneficiary doctrine admit that during the relevant period here – the years leading up to and including the mid-1800s – there was a marked drift in the law *away* from recognition of third-party-beneficiary rights. As noted above, despite some early third-party successes in the seventeenth and eighteenth centuries, between 1790 and 1861 English courts overwhelmingly rejected the claims of third-party plaintiffs who came before them. *See supra* at 18. So, too, the decided trend in America – perhaps expectedly, trailing England by a few years – seems to have been against third-party rights. According to Professor Karsten's research, between 1801 and 1820, state-side courts – led by those in Massachusetts and New York – typically permitted third-party suits. *See* Karsten, *supra*, at 340. But beginning in 1840, while some states (like New

York, he says, citing *Lawrence*) were "cl[inging] to the older rule," *id.* at 343, "others, including ultimately Massachusetts itself, were moving simultaneously to adopt the new English reasoning" refusing to recognize third-party rights, *id.* at 345. (Even in New York, Karsten reports, there were in 1860 already "strong undercurrents of modern doctrine tugging at the old rule's support pilings." Karsten, *supra*, at 344.[4]) As the list above shows, and as Professor Karsten's summary confirms, several other States followed similar patterns - moving during the mid-nineteenth century from a posture of recognition (or at least agnosticism) to one of stubborn refusal. *See* Karsten, *supra*, at 341-53.

Second, on the heels of this general retrenchment against the third-party beneficiary rule - indeed, "almost immediately after *Lawrence v. Fox* was decided" in 1859 - "contract law became dominated by the doctrinal reasoning of the classical contract school, as exemplified both in the cases and in the commentaries of figures like Langdell, Holmes, and Williston." Eisenberg, *supra*, at 1365. Classical contract theory - premised on formal, axiomatic rules and limited liability - was uniformly "hostile to third-party beneficiaries," and "doctrinal objections to suits by third-party beneficiaries soon began to dominate the field." *Id.* Thus, writing in 1880, Dean Langdell concluded that "[a] binding promise vests in the promisee, and in him alone, a right to compel performance of the promise." He found the rule "that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise ... [to be] so plain upon its face that it is difficult to make it plainer by argument." Christopher C. Langdell, *A Summary of the Law of Contracts* 79 (2d ed. 1880). So, too, then-practitioner Oliver Wendell Holmes lectured in 1881 that

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[4] *See also* Hoeflich & Perelmuter, *supra*, at 736 (noting that in the years following its decision, *Lawrence v. Fox* "changed from a precedent to be reckoned with in New York, to a disfavored case").

> The fact that a consideration was given yesterday by A to B, and a promise received in return, cannot be laid hold of by X, and transferred from A to himself. The only thing which can be transferred is the benefit or burden of the promise, and how can they be separated from the facts which gave rise to them? How, in short, can a man sue or be sued on a promise in which he had no part?

Oliver W. Holmes, *The Common Law* 265 (Mark Howe ed., 1963). Under the influence of classical contract theory, "[d]uring the latter half of the nineteenth century, some American states" that had begun to follow *Lawrence*'s lead in recognizing third-party rights "reversed course." Eisenberg, *supra*, at 1367 (citing *Meech v. Ensign*, 49 Conn. 191, 209 (1881), and *Eichelberger v. Murdock*, 10 Md. 373, 379 (1857)).[5]

* * *

In the final analysis, given the state - and vector - of the case law and the post-bellum influence of classical contract theory, it seems fair to summarize by saying that "[a]lthough the seeds of the third-party beneficiary rule were sown in the middle of the nineteenth century, its growth is a twentieth-century phenomenon." Waters, *supra*, at 1149 n.145 (citing Lawrence M. Friedman, *Contract Law in America* 11-12 (1965)). Indeed, even Professor Eisenberg, himself a believer that the seeds might have been sown somewhat earlier, has acknowledged that "[t]he modern law of third-party beneficiaries did not arise until early in this century and did not

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[5] The federal courts, too, were feeling the effects of the retrenchment. In *Hendrick v. Lindsay*, this Court noted offhandedly that "the right of a party to maintain assumpsit on a promise not under seal, made by another for his benefit, although much controverted, is now the prevailing rule in this country." 93 U.S. 143, 149 (1876). Only two years later, however, the Court seemed to limit severely creditor-beneficiary suits to those brought on equity-based theories. *See National Bank v. Grand Lodge*, 98 U.S. 123, 124-25 (1878). "The federal courts thereafter held to this rule consistently throughout the nineteenth century." Karsten, *supra*, at 354.

begin to mature until the early 1930s." Eisenberg, *supra*, at 1360; *see also* Hoeflich & Perelmuter, *supra*, at 735 (it is only "within the past several decades" that "the doctrine of *Lawrence v. Fox* has won a complete triumph"). Against that historical backdrop (and, again, without any apparent legislative history to suggest a contrary conclusion), any assumption that the members of the 39th Congress necessarily intended to incorporate third-party beneficiary rules into §1981's "make and enforce contracts" clause would be dubious at best.[6]

2. McDonald Is Not a Third-Party Beneficiary of the Domino's-JWM Contracts.

McDonald would not have §1981 standing based on any kind of third-party-beneficiary theory, in any event. Even assuming that §1981's "make and enforce contracts" provision could be understood to incorporate modern third-party doctrine, McDonald cannot reasonably be viewed as an intended third-party beneficiary of the contracts in question. McDonald's theory here, of course, is that because he has suffered "personal injury," he is entitled to sue on the contracts. *See supra* at 5. But courts applying the modern

[6] The considerably advanced state of American third-party-beneficiary law in 1991 should not affect this conclusion. When Congress enacted Section 101 of the Civil Rights Act of 1991, it did so not with any thought about third-party-beneficiary rights (one way or the other) but, rather, for the purpose of overruling this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Congress's purpose, specifically, in statutorily defining the term "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," 42 U.S.C. §1981(b), was to ensure that §1981's basic prohibition on discrimination in contracting applied to post-formation claims. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304-06 & n.6 (1994); H.R. Rep. No. 102-40(I), at 89-93 (Apr. 14, 1991) ("overturn," "overrule" *Patterson*); H.R. Rep. No. 102-40(II), at 36-37 (May 17, 1991) (same). There is no discernible congressional intent underlying the 1991 Act to bring third-party beneficiaries within §1981's "zone of interests."

third-party-beneficiary rule have uniformly rejected such a freewheeling standard: As Professor Williston's treatise summarizes, "'not everyone who may benefit from the performance of a contract between two other persons, or who may suffer from its nonperformance ... is permitted to enforce the contract by court action.'" 13 Williston §37:7, at 29 (quoting *Martin v. Edwards*, 548 P.2d 779, 784-85 (Kan. 1976)). The reason is straightforward: "Because the class of third parties potentially benefited by the performance of any particular contract" – or, again, injured by its breach – "is so far ranging, a failure to limit the categories of protected beneficiaries would result in virtually every contract being enforceable by virtually anyone." *Id.* at 28.

The contracting parties' "intent is the principal touchstone for determining whether a third party beneficiary contract exists." *Id.* §37:8, at 62-63; *see also Restatement* §302(1) ("intention of the parties"). Specifically, before a non-party may sue on a contract, "'"he must, at least, show that it was intended for his direct benefit," in either all or part of its contemplated performance.'" 13 Williston §37:8, at 65-66 (quoting *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307 (1927)). The requisite intent to benefit a third-party beneficiary, sufficient to give him the right to sue, can be shown in one of two ways. First, "[i]n the typical case, where the promisor has undertaken to render performance directly to the beneficiary, the intent to benefit the third party will be clearly manifested." *Id.* at 70. That, of course, is not the case here; Domino's has not covenanted to perform directly to McDonald; rather, Domino's promised "to pay JWM." Pet. App. 15.

Second, where (as here) no direct performance is contemplated, the "'one suing as a third party beneficiary has the burden of showing that the provision was for his direct benefit.'" Unless one can sustain this burden, a purported third party beneficiary will "be deemed merely incidentally benefited and will not be permitted to recover on or enforce

the agreement." 13 Williston §37:8, at 70 (quoting *Willis v. E.I. DuPont De Nemours & Co.*, 76 F. Supp. 1010, 1014 (E.D. Okla.), *rev'd on other grounds*, 171 F.2d 51 (10th Cir. 1948)). McDonald cannot "sustain [his] burden" here. The contracts at issue were not made for *his* "direct benefit." Rather, they were drawn for the benefit of Domino's and JWM: Domino's was to get four restaurant buildings (Pet. App. 11), and JWM was to get paid (Pet. App. 15).

McDonald here is, at most, what the law calls an "incidental" beneficiary - one of those "[p]ersons who are neither the promisees of a contract nor third parties to whom performance is to be rendered [who] sometimes derive a benefit from a contract's performance." 13 Williston §37:19, at 123. But, again, the "mere fact that a person who is not a party to a contract would be benefited does not make that person an intended beneficiary" entitled to sue. *Id.* at 130. And "[u]nless the third person is an intended beneficiary ... no duty to him is created." *Restatement* §302 cmt.(e).

McDonald can be expected to argue that his status as JWM's sole shareholder, in and of itself, makes him an intended third-party beneficiary of the Domino's-JWM contracts. But the case law is directly to the contrary. *See, e.g., Lee v. Mitchell*, 953 P.2d 414, 426 (Or. Ct. App. 1998) ("The mere fact that plaintiffs own half of the stock of the corporation does not mean that those who deal with the corporation intend to benefit plaintiffs as individuals; [the corporation] is a separate entity from its owners."); *Amesco Exports, Inc. v. Associated Aircraft Mfg. & Sales, Inc.*, 977 F. Supp. 1014, 1016 (C.D. Cal. 1997) ("[T]he court should not even find that where the corporation only has one shareholder, as here, that the shareholder is a third party beneficiary of any contract of which the corporation is a signatory because that would defeat the purpose of creating the corporation and using it as the signatory.") (cited in 13 Williston §37:19, at 128 n.58), *vacated on other grounds*, 87 F. Supp. 2d 1013 (C.D. Cal. 1997). In that respect, common-law

contract doctrine squares precisely with the decisions of the First and Tenth Circuits holding that even a "sole shareholder" of a corporate contracting party may not sue under §1981 unless he, too, is a party to the contract. *The Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc.*, 295 F.3d 1065, 1070 (10th Cir. 2002); *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 10 (1st Cir. 1999).

Nor, of course, would employee status (there is no indication in the record that McDonald is, in fact, an employee of JWM) of its own force make McDonald an intended third-party beneficiary. *See, e.g., Taylor v. Facility Constructors, Inc.*, 360 F. Supp. 2d 887, 894 (N.D. Ill. 2005) ("[N]othing about the language or circumstances [of the contract] even suggests any intention to create a benefit for ... employees."); *Baidee v. Brighton Area Schs.*, 695 N.W.2d 521, 540 (Mich. Ct. App. 2005) ("'[C]ontractors, subcontractors, and their employees are generally held not to be the third-party beneficiaries of the contract between the general supervisory contractor and the project owner.'"); *Pelletier v. Sordoni/Skanska Constr. Co.*, 825 A.2d 72, 86 (Conn. 2003) (same, as to employees); *Howell v. Ketchikan Pulp Co.*, 943 P.2d 1205, 1207 (Alaska 1997) (same).

Because McDonald is neither a party to nor an intended third-party beneficiary of the Domino's-JWM contracts at issue, he has no standing to sue under §1981.

IV. McDonald's Proposed Construction of Section 1981 Would Dramatically Expand Liability and Trigger a Flood of New Suits.

We close where we began, with the hypothetical action brought against a state DOT by an employee of a company hired to build a public road. *See supra* at 1-2. That is precisely where McDonald's theory of this case leads - to §1981 lawsuits brought by individuals who are altogether removed from the "contract[ing]" process that §1981 protects but who, through various twists and turns, can show some incidental injury from a contract breach.

But surely, it cannot be the law that anyone (employee or otherwise) who is in any way affected by the termination of a contractual relationship can sue under §1981. Were it so, there would be no limit to defendants' potential liability. Indeed, it is that very threat of limitless liability, at least in part, that drives modern third-party-beneficiary doctrine. To repeat Professor Williston's warning: "Because the class of third parties potentially benefited by the performance of any particular contract is so far ranging, a failure to limit the categories of protected beneficiaries would result in virtually every contract being enforceable by virtually anyone." 13 Williston §37:7, at 28. Accordingly, it is just not enough for a would-be plaintiff to show that he would have benefited from a particular contract's performance, or that he has been injured by its breach; rather, he must show that his benefit was one specifically contemplated and intended by the contracting parties.

Likewise, the same threat of limitless liability (or at least litigation) is one of the driving forces behind the prudential standing doctrine's "zone of interests" requirement. Recognizing that there is a very real "potential for disruption inherent in allowing every party adversely affected" by a purported statutory violation to go to court, *Clarke*, 479 U.S. at 397, this Court has emphasized the need for some meaningful restriction - over and above Article III's injury-in-fact requirement - on plaintiffs who can sue under a particular statutory provision.

McDonald's position here - which would allow suit by anyone "personal[ly] injur[ed]" by an allegedly racially-motivated breach of contract - has the potential to blow the doors right off the hinges of §1981 liability.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit's judgment.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

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